

**COMMONWEALTH OF KENTUCKY  
KENTUCKY BOARD OF TAX APPEALS  
FILE NO. K01-R-38**

**DANA CORPORATION**

**APPELLANT**

**v.**

**ORDER NO. K-19424**

**REVENUE CABINET (n/k/a FINANCE AND ADMINISTRATION  
CABINET, DEPARTMENT OF REVENUE),  
COMMONWEALTH OF KENTUCKY**

**APPELLEE**

The Appellant, Dana Corporation ("Dana" or "Taxpayer") has appealed a final ruling of the Appellee, Commonwealth of Kentucky, Revenue Cabinet ("Revenue"), in which Revenue affirmed certain adjustments of Dana's license tax liability for 1994 through 1998, and denied a refund Dana claims is owed to it. Pursuant to an agreement of the parties, no hearing was held in this matter. Instead, the case was submitted to the Kentucky Board of Tax Appeals on the record, which included stipulations entered into, and briefs filed by, the parties. After a review of the record and due consideration, the KBTA enters the following findings of fact, conclusions of law and order.

**FINDINGS OF FACT**

1. Dana is qualified to do business in Kentucky, and is subject to the Kentucky Corporation Income Tax under KRS Chapter 141, and the Kentucky Corporation License Tax under KRS Chapter 136.

2. On October 4, 1999 and January 3, 2001, Dana filed Amended Kentucky Corporation License Tax Returns for 1994 through 1998.

3. The basis for these amended returns was the exclusion of monies borrowed to finance inventory purchases and the inclusion of the net amount of intercompany receivables and payables and advances to and from affiliates from Dana's "capital employed in the business."

4. By letters dated January 26 and May 7, 2001, Revenue denied Dana's refund claims.

5. Also in the letter of January 26, 2001, Revenue advised Dana of an assessment for additional corporation license tax for 1995-1998 equal to \$552,846.00, stating:

"Capital employed has been adjusted to include deferred postretirement liabilities, mortgages, notes bonds payable and other liabilities. The adjustments have been made in accordance with KRS 136.070."

6. Dana timely protested Revenue's denial of Dana's refund claims for 1994-1998, and Revenue's assessment of additional corporation license tax for the same period.

7. Revenue issued its final ruling on the refund claims and assessment on November 13, 2001.

8. On December 13, 2001, Dana timely filed a Petition of Appeal with the KBTA (the "Petition").

9. After the Petition was filed, the parties resolved all but three of the issues in dispute, (a) proper treatment of Dana's other post-retirement benefits account ("OPEB Account"), (b) proper treatment of Dana's advances to/from foreign subsidiaries, and (c) proper treatment of borrowed monies to finance inventory.

10. By Orders dated September 12, 2003 and March 10, 2004, the KBTA resolved the issue related to borrowed monies to finance inventory.

11. Of the \$552,846.00 assessment issued by Revenue on January 26, 2001, \$506,907.00 was the result of Revenue's inclusion of Dana's OPEB in Dana's "capital employed in the business."

12. Dana's OPEB Account is recorded on Dana's books and records as prepared for financial statement purposes in accordance with Statement of Financial Account Standard No. 106 ("SFAS No.1 06").

13. SF AS No.1 06 requires a corporation to list its liability for other post-employment benefits on an accrual basis, over the working lifetime of the employee, which may or may not eventually be paid, rather than a cash, or "pay-as-you-go" basis.

14. The amount of accrued liability in the OPEB Account is determined by actuarial estimates which vary from year to year, and may increase or decrease based upon future events, such as the probability of payment, participation rates, time value of money, and other events affecting the amount and timing of future benefit payments. FAS 106: Employers' Accounting for Postretirement Benefits Other than Pensions, p. 11, par. 21.

15. The OPEB Account represents a contingent liability, which may or may not be paid in future years.

16. The OPEB Account is reduced by cash payments. Cash is not restricted.

17. The OPEB Account represents unencumbered money available to Dana for such corporate purposes as Dana may choose.

18. Dana claims a refund, in the approximate amount of \$196,103.00 (plus interest), based upon offsetting advances to foreign subsidiaries against advances from foreign subsidiaries.

19. The advances are reported in accordance with generally accepted accounting principles.

20. The foreign subsidiaries are foreign corporations.

21. The effect of allowing advances to be offset to a negative number would include in the computation of capital a net asset, advances to affiliates (i.e. an obligation to Dana), which in effect would serve as a deduction from capital by reducing other items properly included in capital.

22. The fact that Revenue has followed a general policy of giving a deduction for monies borrowed to finance inventory does not mean that Dana is the only taxpayer with which Revenue has taken the position that the policy appears to be invalid.

23. Revenue has taken a similar stance regarding the policy's invalidity with other taxpayers at the protest level who have sought a deduction for monies borrowed to finance inventory for an amount in excess of current ending inventory.

24. Dana is not similarly situated to taxpayers who previously took advantage of the policy for the same period, because this period is now time-barred for these other taxpayers, while the years 1994 through 1997 are still open for Dana because of its pending refund claim.

25. Revenue applied an overpayment of income taxes in the amount of \$136,106.00 to the license taxes assessed by it. Revenue has agreed that the income tax overpayment will be credited against the license tax, if any, adjudged to be owed by Dana. To the extent part or all of the income tax overpayment exceeds the amount of license tax adjudged to be due, the excess will be refunded to Dana, together with statutory interest.

## CONCLUSIONS OF LAW

1. License tax is based upon a corporation's "capital." KRS 136.070(1).
2. Capital means capital stock, surplus, advances by affiliated companies, intercompany accounts, borrowed monies or any other accounts representing additional capital used and employed in the business. KRS 136.070(2)(a).
3. Accounts properly defined as capital in this section shall be reported at the value reflected on the financial statements prepared for book purposes as of the last day of the fiscal or calendar year. KRS 136.070(2)(a).
4. License tax measures the value of capital employed in the taxpayer's business in a given year. That measurement must be based on the taxpayer's operations in that year, not on what the taxpayer projects might be its operation in a future year or year. Kroger Co. v. Department of Revenue, Ky. App., 614 S.W.2d 705, 708-09 (1981).
5. Surplus is "the excess of net assets of a corporation over the par or stated value of its corporate stock." Id. at 708.
6. A contingent liability is dependent on events to occur in the future, and might never be paid if the event does not occur.
7. The fact that an estimate is made by an actuary does not make a liability any less contingent. Chrysler Corp. v. Commissioner of Internal Revenue, 33 T.C. 843,860 (1960).
8. Contingent liabilities are properly included in surplus. Kroger, 614 S.W.2d at 708-09; 103 KAR 20:020 Section 1 (8).
9. The OPEB Account is a contingent liability, and may increase or decrease depending on changes in actuarial estimates and the occurrence or nonoccurrence of future

events, such as the probability of payment, participation rates, time value of money, and other events affecting the amount and timing of future benefit payments. FAS 106: Employers' Accounting for Postretirement Benefits Other than Pensions, p. 11, par. 21.

10. The OPEB Account represents the excess of net assets of Dana over the par or stated value of its corporate stock and is properly included in capital as surplus. Kroger, 614 S.W.2d at 708.

11. Affiliated companies means two (2) or more corporations in an affiliated group as defined in 26 U.S.C. 1504(a), except that in determining the voting power and value test prescribed by 26 D.S.C. 1504(a)(2), "more than fifty (50) percent" shall be substituted for "eighty (80) percent". 103 KAR 20:020 Section 1(2).

12. Affiliated group means one (1) or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation. 26 U.S.c. 1504(a)(I)(A).

13. Includible corporation does not include foreign corporations. 26 U.S.C. 1504(b).

14. Foreign subsidiaries are not affiliated companies, and therefore, advances from these foreign subsidiaries do not constitute advances by affiliates.

15. Advances and intercompany accounts are not the same thing and are not required to be treated the same way. KRS 136.070(2); Reyes v. Hardin County, Ky., 55 S.W.3d 337,342 (2001).

16. In any question of statutory construction, the principal goal is to implement the intent of the General Assembly. Wesley v. Board of Educ. of Nicholas County, Ky., 403 S.W.2d 28 (1996).

17. The term "advances by affiliates" means advances from affiliated companies.
18. Advances consist of a loan of money from an affiliated company.
19. The balance of a company's advances by affiliates, shall be the excess, if any, of the advances from affiliates over the advances to affiliates.
20. The term "intercompany accounts" includes both intercompany account receivables and intercompany account payables reflecting the intercompany transactions involving the transfer of money for goods and services.
21. The substance of an account, rather than the nomenclature used by the corporation, controls. Collins v. Kentucky Tax Comm'n, Ky., 261 S.W.2d 303,306 (1953).
22. Exemptions cannot be inferred or implied. LWD Equipment, Inc. v. Revenue Cabinet, Ky., 136 S.W.3d 475 (2004).
23. The term "used and employed" does not modify either advances or surplus. KRS 136.070(2), Kroger, 614 S.W.2d at 709.
24. Dana is not entitled to offset advances to affiliates against advances from affiliate to result in a negative balance for license tax purposes, as the effect would be a deduction or exemption not expressly authorized by statute.
25. Prior to 1976, KRS 136.070(2) provided that the term capital "includes, but is not limited to, capital stock, surplus, monies borrowed for purposes other than current operating expenses and used in lieu of or in addition to invested capital and earned capital used and employed in the business." 1974 Ky. Acts Ch. 161 §1.
26. In 1976, the Legislature chose to eliminate these exceptions, so KRS 136.070(2) now provides that the term capital means capital stock, surplus, advances by affiliated

companies, intercompany accounts, borrowed monies or any other accounts representing additional capital used and employed in the business. KRS 136.070(2)(a).

27. Whenever a statute is amended, courts must presume that the Legislature intended to effect a change in the law. Brown v. Sammons, Ky., 743 S.W.2d 23 (1988).

28. Where a clause in an old enactment is omitted from the new one, it is to be inferred that the Legislature intended that the omitted clause no longer be the law. Inland Steel Co. v. Hall, Ky., 245 S.W.2d 437 (1952).

29. When the Legislature elected to eliminate the "for purposes other than current operating expenses" it intended that all borrowed monies, for whatever purpose, were to be included in capital.

30. Nothing in the current version of KRS 136.070(2) provides for any restriction or limitation on, or deduction from, borrowed monies when determining capital.

31. There is no statutory authority for Revenue Policy 41P520, which allowed a deduction from capital for monies borrowed to finance inventory.

32. Administrative agencies may not amend, alter, enlarge or limit the terms of legislative enactments. Curtis v. Belden Elec. Wire & Cable, Ky. App. 760 S.W.2d 97 (1988); see also KRS 13A.130(1)(a), (b).

33. A policy shall not modify a statute or expand upon or limit a statute, and that any "internal policy, or other form of this section of the spirit thereof, is null, void and unenforceable." KRS 13A.130.

34. Revenue Policy 41P520 is void and unenforceable as a matter of law.



35. Contemporaneous construction cannot be founded upon an administrative agency's failure to correctly apply the law. Revenue Cabinet v. Lazarus, Inc., Ky., 49 S.W.3d 172 (2001).

36. Dana is not entitled to a refund, to the extent its refund claim is based upon monies borrowed to finance inventory, as a matter of law.

37. Dana is not subject to unconstitutional selective enforcement with respect to the issue of borrowed monies.

### **ORDER**

Wherefore, the KBTA orders and adjudges that the Final Ruling is AFFIRMED. Revenue's assessment of \$506,907 plus interest is upheld, and Dana's refund claims for (i) advances in the amount of \$196,103 plus interest and (ii) monies borrowed to finance inventory, are denied.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which

the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

**DATE OF ORDER  
AND MAILING: December 22, 2005**

**KENTUCKY BOARD OF TAX APPEALS  
FULL BOARD CONCURRING**

**NANCY MITCHELL  
CHAIR**